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## **REPORT TO THE MINNESOTA LEGISLATURE**

**Laws of Minnesota for 2004, Ch. 279, Art. 7, sec. 5**

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### **MALPRACTICE INSURANCE.**

The Board of Dentistry shall make recommendations to the legislature by January 15, 2005, on requiring proof of malpractice insurance related to the practice of dentistry or self-insurance alternative as a condition of licensure to practice dentistry under Minnesota Statutes, chapter 150A. The recommendations shall consider a minimum amount of insurance to be required if the board recommends this requirement as a condition of licensure.

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Submitted by the Minnesota Board of Dentistry  
Marshall Shragg, Executive Director

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## MANDATORY MALPRACTICE

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### EXECUTIVE SUMMARY

The Minnesota Board of Dentistry proposed legislation in 2003 that would require actively practicing dentists to maintain professional liability (malpractice) insurance coverage. Malpractice coverage as a requirement of licensure has been suggested as one way of further protecting the public.

A number of questions and concerns have been raised throughout the process of advancing this proposal. Many of the concerns have been addressed, others need more study, and others yet require the kind of development that only experience can bring. Notably, there are several other states and provinces that currently mandate malpractice coverage for licensed health care professionals, involving many health care professions.

This document outlines the rationale, history, and concerns that have been discussed relative to this proposal. The Minnesota Board of Dentistry continues to support the concept of mandatory malpractice insurance as a measure of public protection. The Board, however, will *not* be pursuing any legislation related to this issue at this time.

# MANDATORY MALPRACTICE COVERAGE REPORT TO THE MINNESOTA LEGISLATURE

## BACKGROUND

### BOARD PROPOSAL

The Minnesota Board of Dentistry proposed language in the 2003 session legislative session that would have established failure of a licensee to maintain dental malpractice coverage as grounds for sanctions. The language was reintroduced in 2004 with additional proposed licensure changes for dental professionals.

The Board anticipated that it would require dentists to sign a statement on their biennial license renewal applications attesting that they were carried appropriate professional liability insurance.

### RATIONALE

**Role:** The Board's primary purpose is to protect the public. This is done by the Board of Dentistry in establishing licensure requirements and enforcing the Dental Practice Act when violations occur. The Board is able to take action against a dental professional's license, but is *not* authorized to impose restitution for patients who have been harmed.

**Genesis:** The Board's Complaint Committees have been faced with disciplinary cases involving dentists preying on vulnerable Minnesotans. The most disturbing case of this type in recent years involved a dentist who collected tens of thousands of dollars in fees from elderly patients in advance of promised dental work. Several patients were left with incomplete and/or failed dental implants, a dentist who was not available and not responsive, and lost retirement savings. The dentist, who was not insured, ultimately filed for personal bankruptcy protection, leaving patients with huge financial losses and no recourse to recover their money or get their teeth fixed.

The Board recognized that the public had not been proactively protected, and determined that it would seek to codify ethical business practices for the profession.

### LEGISLATIVE HISTORY

In legislative session 83 —April 2003— bills with the mandatory malpractice requirement were introduced into both the House and Senate, and referred to Committee. The bills (HF1487/SF1377) were not heard in Committee in either body during the 2003 session.

The mandatory malpractice language was incorporated into the Board of Dentistry's licensure bills (HF2377/SF1968) in February 2004. The House, in the Health and Human Services Policy Committee, combined a number of bills related to Health Licensing Boards into HF2175. The bills were heard in the following committees:

HOUSE	SENATE
<ul style="list-style-type: none"> <li>▪ Health and Human Services Policy</li> <li>▪ Health and Human Services Finance</li> <li>▪ Ways and Means</li> </ul>	<ul style="list-style-type: none"> <li>▪ Health and Family Security</li> <li>▪ Rules and Administration</li> </ul>
<i>CONFERENCE</i>	
<ul style="list-style-type: none"> <li>▪ Abeler, Wilkin, Otremba</li> </ul>	<ul style="list-style-type: none"> <li>▪ Kiscaden, Lourey, Vickerman</li> </ul>

The Conference Committee replaced the proposed requirement for professional liability insurance with the following...

**MALPRACTICE INSURANCE.**

The Board of Dentistry shall make recommendations to the legislature by January 15, 2005, on requiring proof of malpractice insurance related to the practice of dentistry or self-insurance alternative as a condition of licensure to practice dentistry under Minnesota Statutes, chapter 150A. The recommendations shall consider a minimum amount of insurance to be required if the board recommends this requirement as a condition of licensure.

On May 29, 2004, the bill as amended, was signed by the Governor.

## **PROFESSIONAL LIABILITY INSURANCE**

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### Primer:

The Minnesota Board of Dentistry's concept was not a "one-size fits all" recommendation; rather, it was developed as a desire to establish some coverage as a minimum expectation. According to the American Medical Association, medical malpractice policy limits range from \$100,000/\$300,000 to \$2 million/\$6 million and higher. Dental professional liability insurance "has customarily been written on either a claims-made or occurrence basis, with the most common limits being \$1 million per incident, with a \$3 million policy aggregate." [insurancefordentists.com, Earhart Leigh Associates (ELA), 12/14/04]

Professional liability insurance is not a single product. Minimum levels are offered, whether standard or non-standard; policies are available that have an extended reporting endorsement ("tail"), "retro-inception" coverage, and no prior acts ("nose") endorsements.

Although, according to the American Dental Association, a number of insurers have withdrawn from the professional liability market, "you still have plenty of choices in most states." [ada.org, 12/14/04]

### Other states/other professions:

A quick review of practice acts and professional association website indicates that several states and provinces have already implemented mandatory malpractice regulations. The list is not exhaustive, but some examples include...

- Chiropractic— Wisconsin was the first state to make malpractice insurance mandatory, effective in 1994.
- Dentistry— To sit for the Florida clinical and written examinations, proof of malpractice insurance is required.
- Medicine— Often a requirement for obtaining hospital privileges throughout the country, malpractice coverage is mandated in Colorado, Connecticut, Florida, Georgia, Kansas, Massachusetts, Pennsylvania, Rhode Island, and Wisconsin, as well as in the provinces of Saskatchewan, Newfoundland, Quebec, and Manitoba.
- Physical Therapy— Saskatchewan requires professional liability coverage of \$5 million or more.
- Pharmacists— The Saskatchewan Pharmaceutical Association's newsletter (March 2002) addresses the reasons for mandatory malpractice insurance and the civil court system as "the only recourse available to the public to pursue negligent professional conduct." They further state that "if professionals are uninsured, then the public has no means to be compensated other than through the personal assets of the professional. Therefore, the public is at least financially protected for the costs associated with... negligence."

## **CONCERNS: BARRIERS to SUCCESSFUL IMPLEMENTATION**

### Legislature

In the House Ways and Means Committee, representatives raised the concerns primarily related to:

1. the number of dentists without malpractice coverage... how many would be impacted by this proposal?
2. the potential costs to dental businesses and consumers if professional liability insurance were to be mandated
3. how the Board would implement this requirement, and
4. the possibility of a "self-insuring" option

Specific responses are not readily available. The number of dentists who go without coverage is assumed to be small; costs and benefits are not known; Board implementation would be by self report; and self-insurance is not considered to be an effective protective measure. Should there be interest in pursuing a professional liability requirement, these concerns could be studied further, but are secondary to the public protection intent.

### MDA

The Minnesota Dental Association, the state's professional association for dentists, had taken a neutral position on mandatory malpractice insurance throughout discussion of the proposed language, although they did raise questions at the House Ways and Means Committee, as well. The MDA's new concerns were outlined at a recent Board of Dentistry meeting as follows:

1. The proposal would be hard to mandate, as not everyone passes underwriting
2. To address the underwriting issue, "guaranty issue" coverage could affect cost/availability of insurance
3. Proposed as grounds for discipline may not address rationale (reactive approach)
4. Administration of proposal by Board: how would it be applied? how much coverage would be required? and
5. Board's own liability — risk if there were an adverse event and the Board didn't ensure compliance

These questions are also important to address. The experiences of other states and provinces should be drawn on to develop and implement any possible proposal.

## **RECOMMENDATION(S)**

Although the intent of the proposal is noble, the Board has determined that at this point in time, the human and financial resources necessary to affect statutory change are not available to the agency. A number of concerns— many outside of the Board's jurisdiction— have been raised that challenge the ability of the Board to successfully implement the proposed requirement of licensure. As a result, the Minnesota Board of Dentistry will not be pursuing passage of a bill containing mandatory malpractice language at this time.



## MINNESOTA BOARD OF DENTISTRY

University Park Plaza, 2829 University Avenue SE, Suite 450  
Minneapolis, MN 55414-3249 [www.dentalboard.state.mn.us](http://www.dentalboard.state.mn.us)  
Phone 612.617.2250 Fax 612.617.2260  
Toll Free 888.240.4762 (non-metro)  
MN Relay Service for Hearing Impaired 800.627.3529

**DATE:** January 7, 2005

**TO:** Patrick E Flahaven, Secretary of the Senate  
Albin Mathiowetz, Chief Clerk of the House  
Robbie LaFleur, Legislative Reference Library Director

**FROM:** Marshall Shragg, Executive Director *MS*

**SUBJECT:** Report to the Legislature: Licensure of Dental Assistants  
Minnesota Laws 2004, Ch 279, Art 7, sec 4

In the last legislative session, the Minnesota Board of Dentistry was directed to report to the legislature regarding amendment to MS § 150A.06 as follows:

Sec. 4. [REGULATION OF DENTAL ASSISTANTS.]

The Board of Dentistry, in consultation with the Minnesota Dental Association, the Minnesota Dental Assistants Association, and the Minnesota Dental Hygienists' Association, shall establish a regulatory system for dental assistants that recognizes the different degrees of practice within the profession, including the expanded duties authorized under Minnesota Statutes, section 150A.10, subdivision 4. The system must establish:

- (1) the appropriate level of education and training;
- (2) the authorized scope of practice for each level of practice; and
- (3) the appropriate credentialing necessary to ensure public safety and professional standing.

The board shall submit the proposed regulatory system to the legislature by January 15, 2005.

The Board has met on several occasions, and considered input from each of the professional associations and many individuals who would be affected by a change in the regulation of dental assistants in Minnesota. The directive from the legislature to develop and propose a regulatory system has been extremely challenging, however, and unfortunately cannot be completed within the time frame requested. Consensus among the Board and all of the professional associations has been elusive.

The Minnesota Board of Dentistry will continue to meet as a full body and through the Board's Policy Committee where this issue will be addressed. I anticipate that we will have a full proposal completed for consideration in the next legislative session.

Thank you.



## Robbie LaFleur

Subject: **Reports to Legislature (Dentistry)**  
Date sent: **Mon, 17 Jan 2005 16:22:39 -0600**  
From: **"Marshall Shragg" <Marshall.Shragg@state.mn.us>**  
To: **<Patrick.Flahaven@state.mn.us>**,  
Copies to: **<sen.becky.lourey@senate.mn>**,

The Minnesota Board of Dentistry was asked to submit reports to the legislature on the following topics:

1. Mandatory Malpractice, and
2. Regulation of Dental Assistants

The documents are attached. Paper copies will be made available if requested.

You will note that the Board has determined that it will not actively pursue malpractice legislation, and that additional work is needed to develop a regulatory system for dental assistants that will meet the concerns of all parties.

Please contact me directly with any questions.

Thank you.

---Marshall

Marshall Shragg, MPH  
Executive Director  
Minnesota Board of Dentistry  
612-617-2257 (office)  
612-280-9964 (cell)  
[www.dentalboard.state.mn.us](http://www.dentalboard.state.mn.us)

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